BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROLYN DUTRO	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,452
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 23, 2010, Post-Award Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded medical treatment with board certified orthopaedic surgeon Glenn M. Amundson M.D., for treatment of claimant's cervical spine and cubital tunnel syndrome complaints. Attorney fees in the amount of $6,827.00 were awarded to claimant's attorney.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Brenden W. Webb of Overland Park, Kansas. Due to the retirement of Appeals Board Member Carol Foreman, E. L. Lee Kinch has been appointed to act as Appeals Board Member Pro Tem in this matter.

The Appeals Board (Board) has considered the record and adopts the stipulations as set forth in the Post-Award Order of August 23, 2010.

ISSUES

1. Is claimant's need for further treatment related to claimant's original work injury with respondent?

2. Did the ALJ exceed his jurisdiction in awarding attorney fees and expenses, post award, pursuant to K.S.A. 1999 Supp. 44-536, without allowing respondent the benefit of a hearing?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Board finds the Post-Award Order of the ALJ should be affirmed with regard to the award of post-award medical benefits, but reversed and remanded for a hearing regarding the award of attorney fees and expenses.

Claimant suffered an accidental injury while working for respondent through a series of accidents ending on February 28, 2000, with injuries to her cervical spine and right upper extremity. Tests confirmed a disc herniation at C5-6. As the result of these injuries, claimant underwent an anterior diskectomy and fusion at C4-6. Claimant was released with restrictions, but respondent was unable to meet the restrictions. Claimant has not worked since leaving respondent's employment. Claimant was also diagnosed with mild carpal tunnel syndrome, rotator cuff tendinitis of the right shoulder and possible right C7 radiculopathy. Claimant underwent endoscopic decompression of the median and ulnar nerves at the right wrist on July 9, 2004. Claimant continued to experience pain in her neck, right shoulder, right elbow, right wrist and right hand.

This matter was settled by way of a settlement hearing on August 31, 2005, with claimant receiving benefits for a 67 percent permanent partial whole person (work) disability. All issues were settled with the exception that claimant had the right to seek future medical treatment for her injuries. The medical reports attached to the settlement hearing transcript were the July 13, 2003, report of Dr. Amundson and the May 14, 2003, report of board certified orthopedic surgeon Edward J. Prostic, M.D.

Claimant was examined multiple times by Dr. Prostic during her employment with respondent and after her injuries resulted in her retirement and subsequent obtaining of Social Security disability benefits. After her settlement, claimant was examined by Dr. Prostic on January 5, 2005. Claimant's range of motion in her cervical spine was limited. However, signs of nerve root irritability were negative. Testing for cubital tunnel syndrome was also negative. Claimant exhibited some signs of rotator cuff tendinitis in the right shoulder. No additional treatment was recommended. Claimant's impairment ratings and restrictions remained the same as in the May 14, 2003, report.

In 2007, when claimant was again evaluated by Dr. Amundson, the doctor requested additional testing for claimant's arm and neck. He also recommended that claimant be seen by board certified orthopedic surgeon William O. Reed, Jr., M.D., the doctor who had performed the median ulnar nerve decompressions in July 2004. Claimant was, instead, referred by respondent to board certified orthopedic surgeon Lanny W.

Harris, M.D., on May 8, 2008. On examination, Dr. Harris found claimant to have a full range of motion of the right shoulder. Claimant lacked 10 degrees of extension in the right elbow and there was tenderness over the ulnar grove and around the medial epicondyle. A positive Tinel's sign was present over the ulnar nerve. Claimant was post cervical spine fusion at C4-6 with right cubital tunnel syndrome and had been diagnosed with diabetes. Dr. Harris determined that, since claimant had not worked since early 2000, and since evidence of cubital tunnel syndrome did not exist until a positive EMG was read on May 10, 2007, the onset of cubital tunnel syndrome was not related to her work activities or her work injury suffered in 2000.

Claimant was referred by respondent to board certified orthopedic surgeon Thomas P. Phillips, M.D., for an evaluation on April 10, 2010. Claimant reported neck pain from an accident on February 28, 2000, while working for respondent. Claimant also reported right shoulder, elbow, hand and wrist pain within a day or two of the accident. An MRI revealed a disc problem in her cervical spine which led to the diskectomy and fusion under the care of Dr. Amundson. Claimant reported migraine headaches after the surgery and severe cervical loss of motion. Claimant also reported prior decompression of the median and ulnar nerves at the right wrist with total relief from that procedure. Claimant's current complaints included neck pain midline with radiation into her upper back, pain to her right shoulder blade and numbness along the course of the ulnar nerve. Claimant is awakened from sleep by neck pain and shoulder pain.

The physical examination by Dr. Phillips displayed very limited range of motion of the cervical spine, but no tenderness or evidence of spasm or atrophy. Range of motion of claimant's shoulders was limited, with the right being more limited than the left. Claimant displayed a positive Tinel's in the right elbow but with full range of motion and no pain, atrophy or instability. Grip strength was limited on the right as compared to the left, but claimant had no pain and range of motion of the hand and wrist was full.

Prior to the examination, Dr. Phillips was provided the medical records from Dr. Amundson and Dr. Reed, reports from Dr. Prostic and Dr. Harris, and the MRI and EMG reports as well. Dr. Phillips ultimately diagnosed claimant with a failed surgery of her neck and some entrapment of the ulnar nerve at the right elbow. No further treatment was recommended for claimant.

Claimant was returned to Dr. Prostic for a re-evaluation on April 12, 2010. Claimant was post cervical diskectomy and fusion surgery at C4-6, with worsening of numbness and tingling to the right ring and little fingers. Claimant remained on heavy narcotic pain medication. Claimant's cervical spine range of motion was very poor. However, her Tinel's was negative at the right elbow with a mildly positive flexion compression test at the ulnar nerve in the elbow. Right cubital tunnel syndrome was confirmed by EMG. Dr. Prostic opined that the cubital tunnel syndrome may be facilitated by cervical spine disease which

he determined was difficult to diagnose due to claimant's poor range of motion. A new MRI of the cervical spine was recommended to rule out cervical spinal stenosis. Dr. Prostic determined that if claimant had cervical spinal stenosis, then the cause would be the work-related accident of February 28, 2000.

Dr. Prostic was provided copies of the medical reports of Dr. Amundson and Dr. Reed, as well as the updated history of the evaluation and treatment from the Heartland Hand & Spine Orthopaedic Center.

During the examination, claimant exhibited pain with a very limited range of motion of the cervical spine. Claimant remained on narcotic pain medication and muscle relaxants. Due to the limited range of motion of the cervical spine, Dr. Prostic was unable to test for cervical myelopathy. X-rays exhibited continued irritability of claimant's cervical spine. Dr. Prostic questioned whether claimant had cervical myelopathy contributing to the cubital tunnel syndrome. An MRI of the cervical spine was recommended in order to determine the presence of cervical spinal stenosis. Dr. Prostic was unable to say, within a reasonable degree of medical certainty, as to whether claimant had cubital tunnel syndrome and whether it has been affected by her cervical spine disease. That was the reason he requested the MRI, for the purpose of making the diagnosis. If claimant does not have cervical spinal stenosis, then there would be no link between the employment and the cubital tunnel syndrome. The MRI would aid in determining whether claimant has additional degenerative changes in her cervical spine which would be the result of the natural flow and progression of her 2000 work-related injury. Dr. Prostic acknowledged on cross-examination that claimant first exhibited signs of cubital tunnel syndrome several years after she last worked for respondent. However, in his opinion, the multilevel fusion would accelerate the breakdown of the adjacent levels of the cervical spine, making claimant more vulnerable to cervical spinal stenosis above and below the fusion. This would make claimant more susceptible to the development of cubital tunnel syndrome.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

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[1] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[4]

The fact that claimant suffered a series of injuries in 2000, resulting in a two-level fusion in her cervical spine, is not disputed. The settlement confirmed claimant's entitlement to a 67 percent permanent partial whole person work disability. From this record, it appears that claimant had a less than satisfactory result from that surgery. Dr. Phillips even went so far as to describe the cervical fusion as a failed neck surgery. Every doctor who examined claimant noted the severe limitations to her cervical range of motion. Dr. Amundson, claimant's original treating physician, requested additional testing to aid in the diagnosis of claimant's ongoing pain complaints. Dr. Prostic requested an additional MRI of the cervical spine to aid in the determination of the cause of claimant's ongoing upper extremity complaints. The ALJ, in his Order, returned claimant to Dr. Amundson for additional treatment of her cervical spine and possible cubital tunnel syndrome complaints. The Board agrees with the decision of the ALJ. Claimant has had longstanding complaints involving her neck and right upper extremity since the accident on February 28, 2000. The fact that she continues to experience symptoms is not a surprise. The Board affirms the portion of the Post-Award Order returning claimant to Dr. Amundson for additional treatment for her cervical spine and for an MRI to determine, pursuant to the recommendations of Dr. Prostic, whether claimant's cubital tunnel syndrome complaints are due to cervical stenosis or myelopathy.

K.S.A. 1999 Supp. 44-536(g) states in part:

> In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contact in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

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[3] K.S.A. 1999 Supp. 44-501(a).

[4] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

K.S.A. 1999 Supp. 44-536(h) states:

> Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

Claimant requests post-award attorney fees. The time itemization provided to the ALJ and utilized by the ALJ in awarding attorney fees was not presented to the court at the post-award hearing. Instead, it was attached to claimant's brief to the ALJ. Respondent contends that no such copy of the fee request was provided to respondent. No hearing was held by the ALJ before the post-award order was issued. Additionally, the award grants attorney fees. However, the list attached to claimant's brief lists both attorney fees and expenses, some of which are specifically prohibited by the Supreme Court's ruling in *Higgins*.[5] K.S.A. 1999 Supp. 44-536(h) is clear in its requirement that the matter "shall be heard and determined" by the administrative law judge "after reasonable notice to all interested parties and attorneys." The failure by the ALJ in this case to hold or even schedule a hearing violates the due process rights of respondent.

Additionally, the file indicates that claimant's terminal date was extended to May 25, 2010, with respondent's terminal date extended to June 25, 2010. Claimant's brief, with the attorney fee request attached, was not filed until June 17, 2010, well after her terminal date. Thus, claimant's presentation of this attorney fee claim was well after her terminal date ran. Plus, this late filing resulted in respondent being allowed only 8 days to review, consider and contest claimant's attorney fee request.

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.[6]

The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.[7]

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[5] *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 204 P.3d 1156 (2009).

[6] *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

[7] *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

> No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.
>
> Whether or not a person has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.[8]

This matter is reversed and remanded to the ALJ with instructions to schedule a hearing regarding the post-award attorney fees request.

CONCLUSIONS

Claimant has satisfied her burden of proving that her ongoing cervical and right upper extremity complaints stem from the injury suffered on February 28, 2000, while working for respondent. The Post-Award Order granting claimant ongoing medical treatment under the care of Dr. Amundson is affirmed. The matter is reversed and remanded to the ALJ for a hearing regarding claimant's request for post-award attorney fees.

ORDER

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post-Award Order of Administrative Law Judge Thomas Klein dated August 23, 2010, should be, and is hereby, affirmed with regard to the award of medical treatment for claimant's cervical and right upper extremity complaints. The matter is reversed and

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[8] 73 C.J.S. Public Administrative Law and Procedure, § 59; *See also Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS,* 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.,* 248 Kan. 450, 807 P.2d 652 (1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n,* 244 Kan. 343, 770 P.2d 423 (1989).

remanded to the ALJ for further hearings with regard to claimant's request for post-award attorney fees.

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING AND CONCURRING OPINION

K.S.A. 1999 Supp. 44-536(g) provides:

> . . . attorney shall be entitled to reasonable attorney fees . . . and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services . . . . (Emphasis added.)

After the expiration of claimant's terminal date and before the expiration of respondent's terminal date, claimant filed with the Division and served upon respondent a submission letter. That letter contained an itemization of the time spent by claimant's attorney and requested a fee based upon that number of hours. Respondent contends that his copy of claimant's submission letter did not have the itemization attached. But the letter read:

> Wherefore, the Claimant requests an Order of this Court finding that she is in need of additional medical treatment related to her work accident at Respondent on or about February 28, 2000; for payment of medical and prescriptions costs; for

> attorney fees herein in the amount of $6,827.00 and for such other and further relief as the Court deems just and equitable.[9]

Respondent neither objected to the fee requested nor requested a hearing. Accordingly, there was no dispute and no requirement for a hearing to be held. Absent a dispute, K.S.A. 1999 Supp. 44-536(h) does not apply. However, in this case, it is appropriate to remand this issue to the ALJ because it appears that the ALJ included in the attorney fee award certain expenses claimant incurred with physicians who were being used as medical experts. It is not entirely clear from claimant's itemization what those charges were for, but it is clear they were not incurred as attorney fees. As such, they should not have been included in the ALJ's award as attorney fees.

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[9] Claimant's submission letter at 3.